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Protection of Children Through Criminal History Record Screening: Well-Meaning Promises and Legal Pitfalls

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> "Legislation should be . . . enacted to make available . . . the sexual assault, child molestation, and pornography arrest records of prospective and present employees whose work will being them in regular contact with children"
>
> —Recommendation of the President's Task Force on Victims of Crime[1]

> "We want and need so desperately to find a solution to the tragedy of sexual abuse that we seem to be grabbing at the first remedy that comes along without considering its cost or its effectiveness."
>
> —Dr. Anne H. Cohn, Executive Director, National Committee for Prevention of Child Abuse[2]

For several years there has been a growing, acute sensitivity to the national problem of child sexual abuse. Unlike the emergent consciousness concerning *physical* abuse (the so-called "battered child"), which occurred between ten and twenty years ago and culminated in the passage of the first federal child abuse legislation,[3] experts today perceive *sexual* abuse to be a potential threat both within the family *and* in out-of-home child care settings.[4] Growing

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1. *Final Report*, President's Task Force on Victims of Crime, December, 1982, Executive and Legislative Recommendation 9. This recommendation was also contained in the *Final Report*, Attorney General's Task Force on Family Violence, September, 1984, State Legislative Recommendation 5.

2. *Preventing Sexual Abuse in Day Care Programs*, National Program Inspection, Office of Inspector General (Region X), U.S. Department of Health and Human Services, Final Report, January, 1985, at 15 (citing statement presented at Congressional Joint Hearings of the Selected Committee on Children, Youth and Families and the Subcommittee on Oversight of the Ways and Means Committee, September 17, 1984).

3. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (1983).

4. It is noteworthy to the author that physical assaults on children, by persons in

knowledge about the behavior of pedophiles, or individuals predisposed towards sexual involvement with children, coupled with sensational events widely reported in the media, have resulted in a call to protect children from predators who some experts believe seek positions that put them in proximity to potential child-victims.[5]

This article examines one widely urged response to a contemporary "crisis in confidence" in child care institutions: checking the criminal justice system's and child protective service agency's records for the histories of adults already involved in, or seeking to work or volunteer in, positions which would place them in close proximity to children. Some believe that such a process will identify people who have committed crimes against children, thus screening them out of employment consideration before they can cause children further harm. Advocates of this screening system also contend that general awareness of the screening process will deter inappropriate people from entering or remaining in positions where they will have contact with children. This reform, however, also has many critics.[6] The history of legislative action related to criminal record screening serves as an appropriate preface to a discussion of the limitations of a screening process and the problems that might be encountered in the implementation of such a system.

I. Criminal History Record Access and Dissemination

A. Generally

The United States Supreme Court has long recognized the inherent right of the state to enact laws and regulations designed for the protection of the public health, safety, morals, and general welfare—especially as far as children are concerned.[7] State licensing statutes or regulations which regulate entry into certain trades and occupations have been leniently reviewed by the Court.[8] In view of a recent decision by the Court in the area of child sexual exploitation,[9] there are grounds to believe that any reasonable state law or regulation purporting to protect children in out-of-home care from abuse would also withstand constitutional challenge.

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institutions who are acting *in loco parentis*, under the guise of "corporal punishment" have not evoked a similar public concern. *See Should Children Be Hit In School?*, Parade Magazine, March 24, 1985, at 4.

5. *See* Lanning and Burgess, *Child Pornography and Sex Rings*, 53(1) FBI Law Enforcement Bulletin 10, 11 (January 1984).

6. Fontana and Alfaro, *No System for Child Abuse Cases*, New York Times, Nov. 7, 1984, at A26; Gordon, *No Child Abuse, No Adult Abuse*, New York Times, March 2, 1985, at A23.

7. *See, e.g.*, Prince v. U.S., 321 U.S. 158 (1944).

8. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Hawker v. N.Y., 170 U.S. 189 (1898); Dent v. W. Va., 129 U.S. 114 (1889).

9. New York v. Ferber, 454 U.S. 1052 (1982).

B. *Hiring Practices and Criminal Background Checks*

With that in mind, let us briefly look at occupational licensing and job application requirements generally. Most agencies which license individuals in trades or professions consider the moral character of the applicant as a critical factor. Licensors or employers typically consider whether the applicant has any prior felony convictions, or convictions of crimes involving moral turpitude. Even an arrest record in these areas without a conviction might be considered relevant to an employment decision.

Such hiring practices are not uncontroversial. Ex-offenders, struggling to find employment, have challenged criminal history-related licensing restrictions as discriminatory. These efforts are generally unsuccessful, since the Supreme Court has found employment *not* to be a fundamental right.[10] The release of arrest records has also been challenged as a violation of an individual's right to privacy. Mere arrest data does not conclusively (or at least beyond a reasonable doubt) demonstrate that an applicant committed the alleged aberant act. However, a number of recent court decisions suggest that the dissemination of arrest records does not violate the subject's constitutional right of privacy.[11] Merely asking an applicant if he or she has been arrested (and confirming this information) may, however, lead to inappropriate results, since the arrests of approximately 50 percent of criminal history record subjects are over ten years old,[12] and studies show that approximately 40 to 60 percent of all arrests do not end in conviction.[13]

Public and private employers may obtain criminal history data in a number of ways. The most common method is to seek this information voluntarily from the job seeker as part of the application process. Some employers use consumer reporting agencies, private investigators, or other third parties to obtain this data where access is generally unrestricted. Finally, requests for this data are made to public criminal justice agencies, usually local police departments or state criminal information system bureaus. Over the last decade

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10. *See, e.g.*, DeVeau v. Braisted, 363 U.S. 144 (1960); *But cf.* Miller v. Carter, 434 U.S. 356 (1978) (per curiam) (successful equal protection challenge to licensing restrictions).

11. Paul v. Davis, 424 U.S. 693 (1976); Rowlett v. Fairfax, 446 F. Supp. 186 (N.D. Mo. 1978); Hammons v. Scott, 423 F. Supp. 618 (N.D. Cal. 1976). *But cf.* Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975); Gregory v. Litton Systems Inc., 316 F. Supp. 401 (C.D. Cal. 1970), modified on other grounds, and *aff'd* as modified, 472 F.2d 631 (9th Cir. 1972). *Cf.* Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any probative value in showing that he has engaged in any misconduct.") *See also infra* note 51.

12. *See* Search Group, *Criminal Justice Information Policy: Privacy and the Private Employer*, U.S. Department of Justice, Bureau of Justice Statistics, 1981, at 7 [hereinafter cited as Search Group].

13. *Id.*

these agencies have been receiving an increasing proportion of requests for criminal history information from prospective employers outside of the criminal justice system.

The Federal Bureau of Investigation Identification Division's criminal history record system maintains the country's largest and most comprehensive collection of state and federal criminal history information. In recognition of the potential value of this system, the 92nd Congress passed legislation to specifically authorize the use of these records for employment and licensing related purposes.[14] Under this statute, the FBI was allowed for the first time to disseminate its computerized criminal record entries for these purposes if it was authorized by a state law and the law was approved by the U.S. Attorney General. Dissemination is only permitted "to officials of State and local governments for purposes of employment and licensing."[15] The Attorney General has delegated to the FBI authority to approve state laws under the federal statute. The regulations implementing the statute prohibit release of arrest record information which is more than a year old not accompanied by a disposition. The stated purpose of this practice is "to reduce possible denials of employment opportunities or licensing privileges to individuals as a result of the dissemination of identification records not containing final disposition data concerning criminal charges brought against such individuals."[16]

The magnitude of FBI criminal history records is astonishing. The FBI today has information in its files on over 84 million arrests. Twenty-two million people are represented in these files. In December, 1984, the FBI received an average of 25,000 new records from throughout the country *each day*. For all of 1984, the FBI received approximately 744,000 requests for employment and licensing screening against its records.

In addition to state laws approved by the FBI for the release of *its* records, most states have several laws relating principally to dissemination of state criminal history record information within the state to public licensing agencies or private employers. Many of these laws have been submitted to the FBI in order to get them approved for FBi record access, thus allowing the state to learn if an applicant has a criminal record elsewhere. Other than provisions relating to the care and supervision of children (which will be discussed in detail below), the state laws typically allow access to

14. Department of Justice Appropriation Act of 1973, Act of Oct. 25, 1972, Pub. L. No. 92-544, Title II, 86 Stat. 1307 (1972).

15. *Id.* Pub. L. No. 92-544 also specifically permitted release of records to the banking industry.

16. 28 C.F.R. § 50.12(b) (1984).

records where prospective employees or licensees will have control over cash, access to private homes, or sensitive contact with the public.[17] In some states, an executive order may specify those who are permitted access to records, or state agencies may be authorized to promulgate regulations that specify who may have access and for what purposes.[18]

A number of states have "open access" systems, and thus make conviction records available to *anyone* upon request, while a few others strictly prohibit any dissemination of records outside of the criminal justice or law enforcement system.[19] Many states limit access to nonconviction records or restrict it entirely.[20] Most states have established centralized criminal history system bureaus with authority to collect, compile, and maintain data and share it with other similar bureaus, the FBI, and other state and local law enforcement agencies. Even in the absence of a specific employer records access statute, an argument can be made that such bureaus may still make records available to non-criminal justice system applicants, particularly if the state has a broadly worded open records law.[21]

II. Development of Federal Legislation Encouraging Criminal Record Screening Related to the Protection of Children

In December, 1982 President Reagan's Task Force on Victims of Crime issued a report which recognized that while most of those who work with young people sincerely desire to help them, there are those who seek to victimize them.[22] On February 17, 1983 Senator Arlen Specter (R. PA) introduced the Juvenile Detention Employees Clearance Act of 1983.[23] The action was prompted by the Task Force's conclusions and on his Subcommittee on Juvenile Justice's findings that a number of individuals alleged to have abused children in Oklahoma training schools had extensive criminal records. Specter's bill would have prohibited employment of any individual at any juvenile "detention, correction, care or treatment" facility unless a "nationwide criminal record check" was conducted through the FBI

17. *See, e.g.*, Md. Reg. § 12.06.08.10(D) (1984); CAL. PEN. CODE § 13300 (West 1982).

18. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1750(B)(7)-(8) (1984); HAWAII REV. STAT. § 846-9 (1983). KAN STAT. ANN. § 22-4707 (1981).

19. *See, e.g.*, WASH. REV. CODE 10.97.050(1),(2) (1980); PA. STAT. ANN. tit. 18 § 9121 (Purdon 1983); *Contra*, WISC. STAT. ANN. § 165.83 (West 1984); WYO. STAT. § 91-1-627(b) (1982).

20. *See, e.g.*, COLO. REV. STAT. § 24-72-305 (1982); TENN. CODE ANN. § 10-7-507 (1980).

21. Search Group, *supra* note 12, at 34.

22. *Final Report*, President's Task Force on Victims of Crime, *supra* note 1, at 32.

23. S. 521, 98th Cong., 1st Sess., 129 Cong. Rec. S1324 (Feb. 17, 1983).

to ascertain "whether the individual has engaged in criminal acts that have a specific relationship to job performance and whether he poses a significant danger of abuse or mistreatment of the juveniles." As will be seen, although this bill made no headway in Congress, the "nationwide criminal record check" requirement was inserted into a law over a year and a half later. However, Senator Specter's intent to specify the *purposes* of the record check failed to be included in that later law.

When Specter's bill was introduced, child sexual abuse was not a constant topic in the media. Six months later, however, public concern about child molestation had mushroomed. On October 5, 1983 Senator Charles Grassley (R. IA) introduced legislation which for the first time in a federal bill addressed directly the employment of people with arrest or conviction records for child sexual assault, child molestation, and child pornography.[24] The preamble of Senator Grassley's bill contained several findings of the President's Task Force on Victims of Crime. The most significant of these findings related to the danger children face from child molesters seeking to be employed in or volunteer for positions which give them ready access to children. The bill advcoated making arrest and conviction records available to relevant businesses and organizations. Grassley sought to create a centralized collection of all state and federal arrests and convictions for child molesting, child sexual assault, and child pornography within the U.S. Department of Justice. This "Child Care Protection and Employees Responsibility File" would have been available as a screening tool for "any qualified child care organization," and a prospective employer would have had to be notified within 48 hours after a request of the existence of "any combination of three or more arrests or any conviction" for a relevant offense.

Again, the Grassley bill made no headway, but the concept of creating a new national file of child abuse related records was to be raised again. The obvious bureaucratic concerns and potential for abuse of a special federal "sex crimes file" prevented this idea from being included in the bill which became law a year after the Grassley legislation was introduced. Indeed, the Specter and Grassley bills were the last Senate proposals in this area until sex abuse scandals at the Virginia McMartin Preschool in Manhattan Beach, California and the Praca Day Care Center in the Bronx, New York made national headlines. By then, some would argue, further congressional action was inevitable.

A different approach was contained in the first legislation on the

24. S. 1924, 98th Cong., 1st Sess., 129 Cong. Rec. S13638 (Oct. 5, 1983).

topic introduced in the House of Representatives. On April 12, 1984 Congressman Ralph Regula (R. OH) introduced the "Children's Defense Act of 1984."[25] Regula's bill was by far the most complex to address this issue, but applied only to convictions of sex offenses where the victim was a child. Unlike all other bills, it would have prohibited any financial assistance to agencies providing services to at least 20 children outside of their home which utilized the services of anyone convicted of a child sex crime.

Under the Regula bill, a complicated system would have been established to assure the prompt reporting of relevant conviction data, and youth-oriented organizations would have been required to make record checks. This bill was the only one to address several important issues: the cost of criminal record checking (equal split among the Department of Justice, individual state, and youth-oriented organization); the promptness of the states' reporting of conviction data to the FBI (no later than 60 days after disposition); the speed in which the FBI responded to a state record check request (not later than 18 days after the request was received); and the security of these records at the state level, because of the sensitive nature of this information.

By the Summer of 1984 child sexual abuse stories were making the news almost daily. Day care centers in particular were under scrutiny. Despite the fact that most sexual abuse of children takes place in their own homes or in isolated acts of molestation in non-institutional settings, Congress was responding clearly to the emotional heat of a national panic. In August, Representative Frank Guarini (D. NJ) wrote to Representative Charles Rangel (D. NY), Chairman of the Subcommittee on Oversight of the House Ways and Means Committee, seeking an immediate hearing on the extent of child abuse incidents at day care facilities, particularly those "supported by taxpayer dollars" (under Title XX of the Social Security Act).[26] He also wrote to the Secretary of the U.S. Department of Health and Human Services asking her to investigate the problem. On September 17, 1984 the Oversight Subcommittee and the House Select Committee on Children, Youth and Families conducted a joint hearing on the subject. Two days earlier, *USA Today*, in their Opinion/Debate Section, featured "Day Care Abuse" and editorially suggested the need for criminal record checks.

Less than two weeks before the hearing, Senators Alphonse D'Amato (D. NY) and Paula Hawkins (R. FL) introduced the National Child Protection Act.[27] Representative Mario Biaggi (D. NY)

25. H.R. 5486, 98th Cong., 2d Sess. (1984).
26. Letter from Congressman Guarini to Congressman Rangel, dated Aug. 9, 1984.
27. S.2973, 98th Cong., 2d Sess., 130 Cong. Rec. S10833 (Sept. 7, 1984).

introduced companion legislation in the House.[28] This legislation was addressed *only* to day care centers and covered a variety of measures intended to protect children in day care from sexual abuse. As to record screening, the bills would have had the U.S. Department of Health and Human Services (HHS) "establish a national file of the names, addresses, and social security numbers of all individuals convicted of crimes involving child abuse, child molestation, *or such similar acts which the Secretary determines ought to be included in such file for the purpose of protecting children receiving child day care services*" (emphasis added).

Under the bill, states would have been required to report appropriate individuals for inclusion in the national file. States would also have had to ensure that none of their day care providers (or center staff) were identified in the file. This was the first bill to make its requirements directly a part of Title XX of the Social Security Act. Its existence obviously influenced the legislation introduced by Representative George Miller (D. CA), Chairman of the House Select Committee on Children, Youth and Families, just a week after his hearing on sex abuse in day care centers. He proposed mandatory criminal record screening in an amendment to the fiscal year 1985 continuing funding resolution bill, offered on the floor of the House of Representatives on September 25, 1984.[29]

Representative Miller stated upon introduction of the amendment that a couple operating a day care home "in my own San Francisco Bay area" had been charged with sexual abuse. Mr. Biaggi also stated that in the first seven months of 1984 there had been 77 reported child abuse cases in New York City day care centers.[30] Miller and Biaggi were responding to well-publicized arrests of operators or employees of day care centers in their own communities. Interestingly, *none* of these publicized cases of alleged sex abuse in child care centers had yet resulted in a single conviction, nor did any of the alleged perpetrators have a prior criminal record. Miller's amendment never had a public hearing. Indeed, it was quickly drafted in response to Representative Biaggi's bill. The same day it was introduced, it passed the House of Representatives by a vote of 369 to 37.

The Miller bill was tied to the Title XX social services funding program and appropriated an additional $50 million for fiscal year 1985 under that Title for training related to child care services. However, the states could not receive more than one-half of their

28. H.R. 6207, 98th Cong., 2d Sess. (1984).

29. Amendments to H.J. Res. 648, 98th Cong., 2d Sess., 130 Cong. Rec. H10048 (1984).

30. 130 Cong. Rec. H10048, H10050 (Sept. 25, 1984).

share of these funds unless they had in effect, "as soon as possible," procedures for "conducting background checks and criminal investigations of all providers of licensed or registered child care services and all operators and staffs of facilities where licensed or registered child care services are provided, in accordance with standards specified in or established under State law."

Representative Miller saw his approach as more reasonable and realistic than the one contained in the pending National Child Protection Act, since unlike that bill it did not create a national child sex offenders file at HHS. Miller's bill also made available much needed new funds for the child care system. Indeed, the elimination of special Title XX training funds several years earlier had left nearly half the states unable to target any Title XX money for training purposes. In recent years the Title XX program had been cut overall by over 25 percent, and the child care system in particular had been hit hard by reduced federal funding.[31] Miller was trying to pump much-needed money back into the system, and in an era where federal budget increases for social services were generally being opposed by the Reagan Administration, he found a politically unassailable way to get more funding. Thus, the Miller bill became the first criminal history screening bill to have new funds to the states included in it.

The bill itself did not specify what criminal screening results would be relevant to child care system employment. On the House floor, however, Miller explained what he had in mind by requiring criminal history checks:

> "We're talking here about some procedures for criminal history record checks, and possibly child abuse central registry system checks. We have left to States the responsibility for fashioning procedures which meet their needs, but it seems minimal to ask that States put in place some procedures to get a provider and staff *sex crime history*"[32] (emphasis added).

III. Title IV, Section 401, P.L. 98-473: Federal Law Finally Emerges

When the Miller bill passed the House as part of the Continuing Resolution, it was inevitable that the Senate would have to address the criminal record screening issue. On October 2, 1984, only a week after the House cleared the Miller bill, Senator Dennis DeConcini (D. AZ) co-introduced with seven colleagues of widely-ranging ideologies (Levin, Moynihan, Hawkins, Specter, Dodd, Metzenbaum

31. Children's Defense Fund, A Children's Defense Budget (1985), at 203-214.
32. 130 Cong. Rec. H10049 (Sept. 25, 1984).

and Kennedy) an amendment to the Continuing Resolution which differed significantly from Miller's in the following notable ways:

a) It added $25 million to Title XX, not $50 million;
b) It gave states until September 30, 1985 (instead of "as soon as possible") to implement the screening requirement;
c) It required a *national* record check (not statewide only, as did Miller); and
d) It was made applicable to far more than "licensed or registered child care services," encompassing "any facility having primary custody of children for 20 hours or more per week" as well as all "juvenile detention, correction or treatment facilities" (an element resurrected from Senator Specter's S.521).

Specter now made the principal remarks about criminal record screening on the Senate floor.[33] He stated that the checks would be required "through the FBI's fingerprint files, rather than only statewide, so that the convicted sex offenders could not simply move from State to State finding child care work." Specter went on to recount stories he had heard during an earlier hearing on S.521 and S.1924 — reports of abuse by a residential counselor in a home for delinquent adolescents, a county recreation department softball coach, director of a county summer day camp, and a church boys choir director. Finally, as advocates for such legislation had done on a number of earlier occasions, he recalled that states already required FBI screening for such occupations as casino workers, real estate sales people, racetrack workers, securities brokers, doctors, and lawyers.

The time had come for people working with children to be added to this list. In a House-Senate Conference, the conferees agreed to accept the Senate version of the amendment, and the screening requirement was signed into law by the President on October 12, 1984 as part of the 1985 Fiscal Year Continuing Appropriations Act.[34] The new screening bill thus became law only 23 days after the legislation was initially introduced and without any public hearing!

One noteworthy aspect of the law was its reference to P.L. 92-544 (discussed earlier in Section I). The "DeConcini Act" (as the new criminal record screening law will hereinafter frequently be referred to) required states to enact special laws *mandating* (not merely authorizing) the FBI screening under P.L. 92-544. Senator Specter noted that "there are some 250 state statutes approving access to FBI fingerprint files," but that only four states had "such

33. 130 Cong. Rec. S12712 (Oct. 2, 1984).
34. Act of Oct. 12, 1984, Pub. L. No. 98-473, Title IV, § 401, 98 Stat. 2195-2197 (1984).

statutes for day care workers"[35] only six states "for school teachers"[36] and only four states "for school bus drivers."[37] With new federal encouragement, the DeConcini Act's advocates hoped that this would change.

The now largely expanded interplay between federal, state and local law is bound to spawn some problems in the implementation of the Act. Before these problems can be addressed, the variety of means that states have employed regarding criminal record screening should be examined to provide a more balanced perspective.

IV. State Laws: A Myriad of Approaches

Early reaction to the DeConcini Act from the child care community disclosed that a number of states already claimed to be doing statewide criminal history record checks as a child protection device, even where they weren't mandated.[38] Under Representative Miller's version of the bill, this practice probably would have been sufficient to comply with the law, but the additional reference to P.L. 92-544 and the requirement for *nationwide* screening caught most child care providers and licensing agencies off-guard. In fact, most child advocates were even unaware that the FBI Identification Division's record files were not meant to be accessed by a mere name check, but rather by the submission of classifiable fingerprints. Computer analysis of fingerprints by the FBI is important because employees or job applicants may be using aliases, or may have an extremely common name. Thus the submission of fingerprints is the most accurate and useful screening device. However, fingerprinting of all applicants *and* existing staff (which would probably have to be done by local police or specially trained public agency staff) has been anathema to many in the child care field.

To date, only two states have specific legislation mandating an *FBI* record check for child care system people.[39] Georgia law allows

35. 130 Cong. Rec. S12712 (Oct. 2, 1984). Senator Specter cited Alaska, California, Illinois, and Minnesota. A list of state statutory citations to laws specifically authorizing or requiring some form of criminal history record or child abuse registry screening for people working, volunteering, or otherwise caring for children appears at the end of this article.

36. Senator Specter cited New York, California, Florida, Nevada, Alaska, and Texas.

37. Senator Specter did not cite any specific states here, but Alaska, Arizona, Illinois, and New Jersey appear to have such legislation covering all school bus driver applicants.

38. *Model Child Care Standards Act — Guidance to States to Prevent Child Abuse in Day Care Facilities*, U.S. Department of Health and Human Services, Office of Human Development Services, January, 1985, at 27 (24 states claimed to be currently screening some day care operators and/or staff through statewide criminal record files) [hereinafter cited as Model Child Care Standards Act].

39. GA. CODE ANN. § 49-5-60 to -74 (1984). MINN. STAT. ANN. § 245.783 (West 1984). Nevada has mandated FBI fingerprint checks prior to the certification of teachers and other educational personnel. NEV. REV. STAT. § 391.020 (1983). Florida recently mandated FBI checks for new permanent and substitute teacher certification. FLA. STAT. ANN. §§ 231.17 and 231.47 (West 1984).

screening procedures to be used by the Georgia Crime Information Center, as well as by directors of licensed child care programs (and applicants for these positions). The procedures tie FBI *fingerprint* checks of directors and director-applicants into the state's licensing process. Minnesota requires checking national criminal record repositories on individuals connected with the application for or renewal of a license, including program operators, all persons living in the licensee's household, and all day care or residential facility staff.

Two other states specify a fingerprinting requirement as a condition for state criminal record screening.[40] Alaska law does not *mandate* checks but merely authorizes or permits access to crime information files. This is a common state statutory scheme,[41] but it is not what the DeConcini Act contemplates by the use of such language as "requiring criminal record checks." California does require criminal record screening using fingerprints, and further prohibits hiring and mandates immediate termination if the person screened is found to have a criminal conviction.

One critical issue is whether the existence of a prior record (and nature of the crimes in that record) should strictly *prohibit* the issuance of a state license, as well as mandate that an employee be *fired* or an applicant not be hired. This issue is addressed in only a few states besides California. Colorado law states that a child abuse or sex offense conviction shall render an applicant ineligible for a license or certificate to operate a family care home or center.[42] If an employee of an already licensed program or "person who resides with the licensee" (a unique provision) is found to have such a record, the license "may be revoked." Interestingly, Colorado also permits license revocation when there are unproved criminal charges, but the individual has admitted committing the offense. New Hampshire simply states that if the applicant "is found to have been convicted of child abuse, he shall not be issued a license."[43]

California, Colorado, Georgia, and Minnesota, require that a record check be made as a *condition* to the receipt of an operating license by a child care facility. Alternatively, the law can merely grant *authority* for the release of records to a public child welfare or

40. ALASKA STAT. § 12.62.035 (1984); Cal. Health & Safety Code § 1522 (West 1984) (persons in day care and residential facilities), CAL. EDUC. CODE §§ 45123, 45125 (West 1978) (persons employed by a school district), and CAL. PENAL CODE § 11105.2 (West 1982) (optional employer requests for sex crime convictions when person would have supervisory or disciplinary power over a minor).

41. The Alaska statute provides that "an interested person . . . may request . . . records of all convictions" and that the state ". . . shall authorize the disclosure of the information." ALASKA STAT. § 12.62.035(a)(1984).

42. COLO. REV. STAT. §§ 26-6-104, 26-6-108(2) and (3) (1984).

43. N.H. REV. STAT. ANN. § 170-E:4 (1983).

youth services agency, as in Connecticut and Virginia.[44] States may, as in Alaska and Kentucky,[45] permit private child care providers to receive state criminal history information directly, without going through an intermediary child welfare or social services agency. However, the FBI will not release its records directly to a provider of child care services.

As for those categories of *positions* which require checks or for which checks are authorized, there is once again great variation. Some states take the broadest possible approach, as in Alaska, California, and Kentucky (all persons with supervisory or disciplinary power over a minor) and Connecticut (all persons whose primary duty is the care and treatment of children). Alternatively, only certain positions may be specified, such as family day care providers (Maryland),[46] teachers (Florida and Nevada), or foster and adoptive parents (Virginia). As for checking volunteers, four states (California, Connecticut, Florida, and Kentucky) specifically address this in their legislation. No state law has language which specifically requires checks for staff members of all juvenile detention, correction, or treatment facilities, as is required in the DeConcini Act.[47]

States also differ as to what information is searchable as part of the record check. It may be all convictions, whatever the type (as in California, Connecticut, and New York[48]); or it may only be child abuse or sex offense convictions (as in Colorado and Kentucky). Georgia permits consideration of arrests not resulting in conviction as long as there is a charge pending. New York[49] and New Hampshire *require* checks of their civil child abuse central registry systems, something alluded to by Congressman Miller in his explanation of his bill to the House of Representatives. Unlike state criminal history record systems, the state child abuse registry consists of information based on reports of child maltreatment (usually intrafamilial) which are referred to social workers and then either "substantiated," "not substantiated," or are under investigation by a

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44. CONN. GEN. STAT. ANN. § 54-142k(f) (West 1984); VA. CODE § 19.2-389(A)(vii)(a) (1983).

45. KY. REV. STAT. ANN. § 17.160 (1984).

46. MD. FAM. LAW CODE ANN. § 5-5512(c)(iii) (1984).

47. Under 28 U.S.C. § 534, the FBI is specifically authorized to provide its criminal history records to other law enforcement and criminal justice agencies. Many states have similar laws or policies relative to their own records. Operators of juvenile detention and correction facilities, especially those licensed, approved, or controlled by state youth correction agencies, should therefore be able to obtain FBI and state criminal history record information on employees or prospective employees through the relevant state agency. Thus, no new state or federal legislative authority is probably necessary for these facilities to have authorized access to such information (but note that new state legislation may be necessary in order to *mandate*, rather than merely authorize, such checks).

48. N.Y. SOC. SERV. LAW § 378-a (McKinney 1983).

49. N.Y. SOC. SERV. LAW § 424-a (McKinney 1984).

worker. No court action is usually required for an entry to be made in the central registry.

V. Issues to be Addressed

Although many states not mentioned in Section IV already have legislation granting free and open access of criminal history record information to private employers as well as to public licensing or children and youth service agencies, their failure to *mandate* such checks, as contemplated by the DeConcini Act, is a critical deficiency. Of the few states discussed above with specific statutory language related to child care, only about half (California, Colorado, Florida, Georgia, Minnesota, and Nevada) require criminal record checks, and then only for a limited scope of providers, employees, or volunteers. Only Georgia, Minnesota, and Nevada specifically require in their statutes a check with the FBI (and in Nevada it's only for educational personnel). In approving a state law under the conditions set forth in P.L. 92-544, the FBI will look for whether a nationwide or federal record check is specified in that law, or that the state legislature clearly intends that a nationwide check be conducted. Therefore, massive state legislative change will be required for states to meet the letter and spirit of the new federal law. Discussed below are some of the most important concerns which must be addressed when legislators, child advocates and other policy-making people are considering legislative and agency procedural changes related to this issue.

A. Need to Define Terms/Scope of Screening

No terms are defined in the DeConcini Act, and its meager legislative history is of little use in clarifying the meaning of "criminal history record checks," "child care facilities," "out-of-home care," and "juvenile detention, correction, and treatment facilities." Neither the U.S. Department of Justice nor the U.S. Department of Health and Human Services have standard working definitions for these terms that are incorporated in legislation or agency regulations. State legislators considering new legislation which would comply fully with the intent of the DeConcini Act are having to decide, without any guidance from the federal government, how broadly or narrowly to construe these terms.[50]

50. On Jan. 15, 1985 the U.S. Department of Health and Human Services (HHS), Office of Human Development Services, issued state allotments under the DeConcini Act and took the position in this announcement that HHS would not further interpret the statute. Rather, it was the express intention of HHS in this announcement that the states, not HHS, ". . . will define terms (e.g., child care settings, juvenile detention facilities) and activities" in "the context of their own services programs and needs." 50 Fed. Reg. 2089 (Jan. 15, 1985).

The possible questions of interpretation and variation of approaches are endless. Should arrests as well as convictions be checked? *Full* arrest data is presently unavailable from the FBI unless it is under twelve months old or is otherwise accompanied by dispositional data.[51] Many states strictly prohibit access by employers to anything other than conviction information.[52] Beyond demonstrable criminal charges, there is the question of checking central child abuse case registries, and is not clear whether the Act requires or intends that this be done.[53] Any proposal to use the civil child abuse registry for employment screening is likely to be met with strong opposition by civil liberties groups concerned about the fact that a registry entry could be made on a suspected "perpetrator" of child maltreatment by government social services personnel merely on the basis of a cursory investigation by an untrained case worker or an anonymous report.[54] The stigma associated with being entered in the registry, it is argued, is not justified because of the lack of due process of law. These registries were set up to track abused *children*,

51. 28 C.F.R. § 50.12(b) (1984). In Allen v. Webster, 742 F.2d 153 (4th Cir. 1984), a U.S. Court of Appeals upheld the denial of a request for expungement of an FBI arrest record (where there had been an acquittal) that allegedly interfered with an individual's attempt to secure employment. The court stated that "exceptional circumstances" (e.g., civil rights violations, police misconduct, arrest based on a law held unconstitutional) were not present to justify expungement, and it noted that FBI dissemination of arrest records to employers was specifically authorized by 28 U.S.C. §§ 534 and 28 C.F.R. § 0.85(b), (j). *But see* Natwig v. Webster, 562 F. Supp. 225 (D.R.I. 1983) (court exercised its equitable power to order the expungement of an arrest record). Concerns about the accuracy of arrest records maintained in FBI files and their dissemination to non-law enforcement agencies have led to critical judicial scrutiny of FBI practices in this area. *See* Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); Tarlton v. Saxbe, 407 F. Supp. 1083 (D.D.C. 1976).

52. A review of state laws by the Search Group (*supra* note 12, at 33) published in 1981 found that ten jurisdictions provided statutory authority for private employers to obtain both conviction and non-conviction arrest data, while seven state laws provided access to conviction data only. At the time research was conducted for this article, there were nineteen states with specific laws on criminal record checks for people working with children, and of these only one (Minnesota) specifically included access to arrest information.

53. The Act neither defines what is meant by "criminal record checks" nor the "background checks" which are also required. Congressman Miller stated in the House of Representatives that his legislation could be construed as including checks of civil child abuse agency records (*supra* note 32, at H10049). The recently released HHS *Model Child Care Standards Act* (*supra* note 38, at 25-26) analyzes the use of such civil "registries" as a background screening source. The HHS survey reported that registry checks were required in nine states for prospective caregivers in day care centers, in ten states for family day care homes, and in five states for group day care homes. The author's research disclosed only three states (Minnesota, New Hampshire, and New York) where child abuse central registry records were searchable as part of a process of screening out-of-home care providers or employees working with children.

54. *See Model Child Care Standards Act*, *supra* note 38, at 26 ("In States where licensing agencies do receive such information, States may want to develop confidentiality procedures as well as an appeals process for applicants who are rejected for employment based on information in the registry." This Model Act went on to confirm that "many registries contain names of persons for whom the allegation of abuse was never substantiated"). Presently, federal regulations impose strict limits on access to state child abuse registry information as a condition of state eligibility for federal Child Abuse Prevention and Treatment Act funds (*see*, *supra* note 3). These regulations are written in such a way as to prohibit the use of central registry records for employee or licensee screening. *See*, 45 C.F.R. § 1340.14(i) (1983).

not adults who might be applying for jobs. To permit the registries to be used for employment or licensing screening might destroy the fundamental purposes and integrity of the central registry system.

The new federal law also fails to specify what prior crimes are relevant to the screening process. There are many practical approaches to conducting a record screen. One method would be to get an entire criminal record or "rap sheet" and peruse it for all possible signs of character flaws. Alternatively, a request could be made to the criminal record agency *only* for *that part* of the record which might pertain to crimes against children and general sex crimes. There is reason to believe that the sponsors of the federal Act were only interested in the alternative approach, but they did not say so in the legislation.

Whether states can fully comply with the DeConcini Act by seeking only record information pertaining to child abuse or other crimes against children is unclear. The advantage of this approach is that it would avoid employers or licensing agencies being inappropriately prejudiced by knowledge of prior arrests and convictions for offenses having no bearing on a person's ability to safely care for children. This is a particular concern in juvenile correction facilities, where some of the best staff may have prior criminal records: their own negative "experience" in the criminal justice and corrections system may make them better able to relate to troubled juveniles.

Another problem for states is the decision of what facilities or providers to include under their screening requirement. Do they include Head Start programs and nursery schools (pre-schools) which are technically not considered day care centers? What about public and private grade schools?[55] If you screen people in school positions, do you limit this to teachers and administrators, or do you include all other professional personnel as well as bus drivers, janitors, cooks, and others? Do you also require all people working in schools through a contract with an outside organization to be screened? The inclusion of school personnel in screening processes is one of the major policy questions to be addressed by the states, and it is one for which the DeConcini Act gives little guidance. The inclusion of educational system staff and people under contract would magnify considerable the costs and bureaucratic problems associated with criminal record screening.

There are also a number of non-educational community programs which "care" for children. With more parents working, these programs shoulder an increased burden of caring for children. Scout-

55. Of the nineteen states identified by the author as having specific criminal record screening laws relating to children, only four (Florida, Nevada, South Carolina, and Utah) specifically mention educational personnel in schools.

ing programs, Big Brothers/Big Sisters, parks and recreation activities involving kids in playground-based sports and other pursuits, clubs, camps, etc. have been ways in which children could receive out-of-home adult attention aimed at their healthy growth and development. States will have to consider whether to pass laws which require personnel in these largely volunteer-run programs to be screened. Certainly, children are potentially no less vulnerable in the above-listed activities than are their counterparts in day care centers and juvenile treatment facilities.

There are other types of "out-of-home" care facilities that states might choose to cover under screening requirements. One type of facility which is not clearly covered under the DeConcini Act is the hospital which cares for sick children (clearly, a form of out-of-home care for children for more than 20 hours per week). Runaway youth shelters represent another type of program for children that may or may not be considered "juvenile treatment facilities." Family day care homes (typically, adults providing home-based care for fewer than seven children), family foster homes, and residential group homes for children are also places where substantial number of children receive care outside of their own parents' homes. Few states, however, have laws which require criminal history screening for these caretakers.

One complex question relates to whether screening should and can realistically be done for *unlicensed* facilities and providers as well as licensed ones. Representative Miller's bill would have limited the screening to "licensed or registered" providers and staff, but the DeConcini Act failed to include this provision. Some would argue that it is not feasible to screen, or to even know about, unlicensed providers of care for children. Yet, many children routinely receive out-of-home care from unregulated caregivers.[56] Aren't these children worthy of all the protections that can be provided?

Yet another shortcoming of the federal (and most existing state) legislation is the failure to specify whether screening must, or can, be conducted on volunteers, substitutes who are used sporadically to replace absent employees, and those people who reside in private homes where child care or foster care is provided. The latter would include adults residing in the household other than the official

56. According to an HHS report (*supra* note 2, at 11), all states license at least "some" day care centers, but only thirty states license family day care homes, and only twelve states register family day care homes (a less intensive regulatory mechanism). In addition, it has been estimated that 75-90% of children in day care settings are receiving care from neighbors, friends, babysitters, and other unregulated caregivers. Select Comm. on Children, Youth and Families, 98th Cong., 2d Sess., Families and Child Care: Improving the Options 94 (Comm. Print Sept., 1984).

provider,[57] as well as older children regularly in the home.[58] In family day care homes where a female adult is typically the "official" provider, a male occupant of the home who could pose a danger to children might not be screened without a specific legal mandate to do so. Disturbed adolescents in a home are often common perpetrators of abuse on young children, offering justification for screening older teenagers in such a household. Research shows adult sex offenders routinely report that their earliest sexual assaults were committed while they were in their teens.[59] One final definitional/scope problem is the DeConcini language referring to "custody of children for 20 hours or more per week." Children in out-of-home care for only 19 hours a week are just as potentially vulnerable to abuse. States will have to decide whether or not to use this "20 hours" criterion as a cut-off for the screening requirement.

B. Role of Law Enforcement Agencies

Without full cooperation from federal, state, and local law enforcement agencies, the DeConcini Act can not be implemented adequately. The Act refers to Public Law 92-544, a U.S. Department of Justice appropriations provision which is now over a decade old and has rarely been interpreted by the courts.[60] As mentioned earlier, P.L. 92-544 gave the FBI authority to provide information from its records for employment and licensing purposes. The new Act anticipates complete and speedy FBI assistance under P.L. 92-544 to state criminal record bureaus or state licensing agencies in making "nationwide criminal record check" information available as requested. Nowhere in the new Act are any of the roles and responsibilities of the FBI specified. If states enact new legislation to mandate FBI checks, as anticipated, the Bureau could be besieged with state licensing agency requests for help in developing screening protocols. Hopefully, guidance will soon be forthcoming from the FBI on the proper methods to facilitate state and local requests for criminal history records.

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57. Only five state laws which address criminal record screening for people caring for children specifically include provisions for screening adults residing in the caregiver's household (California, Colorado, Connecticut, Florida and Minnesota).

58. It is reported in the HHS *Model Child Care Standards Act* (*supra* note 38, at 31) that FBI files contain no records on juvenile offenders unless they were tried as an adult. This is also true of many central state criminal history record files. Therefore, it may be presently impractical to effectively screen teenage household members who may have had relevant record in juvenile delinquency proceedings.

59. Knopp, Remedial Intervention in Adolescent Sex Offenses: Nine Program Descriptions (Revised, 1985), at 16-18 summarizes several earlier studies showing that patterns of sexually aggressive behavior frequently begin in adolescence, with a gradual escalation to more violent behavior. For example, a sample of convicted adult rapists in a Connecticut prison reported a modal age of 14 years for their first rape.

60. *See supra* notes 14 and 51.

At the state and local level, police and criminal justice agencies will have to provide guidance to employers and licensing authorities on how to process record requests. Official forms, FBI fingerprint cards, and instructions may have to be distributed to youth care licensing agencies. A system will have to be developed to manage the fingerprinting of applicants, employees, and volunteers, if this is to be done at local police stations. Alternatively, in the unlikely event that child care and youth services programs will be responsible for having fingerprinting occur on-site, law enforcement or specially trained licensing agency staff will have to be assigned to visit programs in order to assure that fingerprinting is done correctly (i.e., the prints are properly taken so that they may be classified by the FBI for direct computer identification comparison).

Once record check requests are submitted, the FBI's reply may be extremely difficult for the lay person to decipher. Police and other criminal justice agencies will have to assist licensing authorities and employers by providing guidance on how to interpret the criminal history information, forms, and notations received from the FBI as well as state sources. Offenses listed in these records may be filled with jargon, encoded, or otherwise unintelligible. In addition, the records may not clearly describe the precise offenses, or more importantly whether serious crimes were committed against children or adults (e.g., first degree sexual assault) or were relevant sex crimes at all (e.g., a conviction for "battery" which may have resulted from a plea bargain from an original charge of child molestation). If records and "rap sheets" are to be disseminated, some instruction will have to be given on how to read and understand them.

Likewise, guidance from law enforcement agencies will be essential on how to use criminal history record information in making employment decisions (see subsection F below). Instructions will also have to be given on the confidentiality of material (see subsection E below). Licensing agencies and providers will need to have names of people in law enforcement agencies who they can contact when inevitable questions arise on the use of criminal history data. A major problem will certainly be the incomplete nature of much of the data received from state criminal justice and FBI sources. Arrests may be listed without showing dispositions, or the final outcome of cases may be difficult to decipher from the written material provided. In some cases, other states will have to be contacted directly to provide dispositional information or to further elaborate on incomplete or confusing entries.

C. *Financial Considerations*

Policymakers are going to have to come to grips with the cost

implications of criminal history record screening. Massive system-wide record checking will result in significant financial costs to state criminal record system bureaus, state licensing programs, local law enforcement agencies, providers, and (if the costs are shifted to them) unemployed job applicants and poorly-paid employees. The DeConcini Act is silent on the cost issue. However, it is clear that none of the new $25 million in Title XX money can be used for screening costs. For some states, passage of mandatory screening legislation without new funds to support it could cause a serious financial burden resulting from the screening of thousands of people.[61]

The cost to state licensing and human services agencies in administering a new screening process could be extremely high in states with large child care and youth corrections systems. Staff of state or county agencies may have to be specifically assigned to establish and maintain a record processing system, as well as to instruct providers on their obligations under the screening law. Beyond the bureaucratic costs involved in operating an effective system for record screening, there are of course the costs incurred in processing individual requests for records. Such individual checks may cost between $12.00 (the present cost to a state agency of an FBI record check) and $30.00 each, with every level of criminal justice system processing (local, state, and federal) adding to the cost. Some legislative guidance will be necessary to specify how these costs are to be paid. Employees and job applicants may find themselves incurring the cost personally; their employers may assume these obligations; or some local, county, or state agency may choose to cover these expenses.

D. Delays in Processing

Once a child care or youth services program decides to have a staff member or job applicant processed for a criminal record check, there will inevitably be a series of delays before the program receives the necessary information or clearances. Assuming that fingerprinting will be required, arrangements will have to be made with local police or some other law enforcement or licensing agency for this to be done. Therefore, there will be some delay in actually getting peo-

61. An HHS report (*supra* note 2, at 19) has estimated the cost of doing both an FBI and state criminal history screen at $25 per applicant and further estimated that to fully meet the intent of the DeConcini Act one million employees would have to be screened nationally, at a total cost *for the screening process* of $25 million (exactly the amount appropriated for federal fiscal year 1985 under the DeConcini Act, none of which may be used for screening costs). This report also estimates that full FBI fingerprinting of all licensed day care employees will require an outlay of approximately $37.5 million over three years in government or private funds, and concludes that at least ". . . half of this would be wasted on extremely low-yield fingerpring screening." (at 4).

ple fingerprinted. There will be additional time incurred in transmitting the prints for state and FBI processing. Finally, there will likely be a brief delay in getting information back from the FBI[62] or state criminal justice agency and then transmitting it back to the provider through appropriate state agencies.

Child care and youth services programs will need instructions on how to handle employees and applicants during the time of these delays. Most new employees will probably have to be hired provisionally, since programs are typically short-staffed and employee turnover is constant. These employees should be on a carefully supervised probationary status. Employees who have worked in programs for years will have to patiently wait to be "cleared," a process which for some may cause considerable anxiety if they have criminal histories unknown to their employers. When a record check comes back "positive," there may be criticism of the process which allowed this person to work closely with children while the record request was pending. Employer concerns in such a situation may be heightened out of concern over potential liability.

E. Privacy and Confidentiality

As states develop new criminal record screening laws, policymakers must ensure that safeguards are provided in the legislation and relevant agency regulations in order to assure the confidentiality of the criminal history information that licensing agencies and employers receive. Job applicants and existing employees must be alerted to the fact that a state and FBI record check is being made, as well as to how a criminal record will affect their employment. Applicants and employees should have the right to personally inspect the record information received on them, as well as to challenge information in the records that they believe is inaccurate or misleading. Employers must be sensitized to the potential negative impact on their employee's reputation and future employability when a staff member's record check comes back "positive."

Legal actions for invasion of privacy brought by employees to restrict dissemination of criminal history information to their employers are not likely to be successful.[63] Nevertheless, the privacy rights employers and job applicants have must be addressed by appropriate legislation. After reviewing existing state and federal laws and regulations affecting the confidentiality of criminal and child

62. HHS (*supra* note 38, at 32) reports an FBI estimate that it takes an average of 14 days for an FBI fingerprint check to be processed. However, further delays may be engendered because of FBI rejection of fingerprint cards for lack of clarity in the fingerprint impressions or for other reasons.

63. *See supra* notes 11 and 51.

abuse registry information, states may identify areas in which their own existing policies and legislation, developed to comply with the DeConcini Act, might conflict with present privacy or confidentiality laws. Indeed, the federal government may have to change its *own* regulations where they now effectively restrict release of records to employers.[64] States will also need to develop policies which limit further dissemination of records after they are received by employers or licensing agencies, including possible criminal and civil penalties for unauthorized release of this information.

Another policy decision facing states will be whether their central state repositories of information (e.g., criminal history record bureaus and civil child abuse registries) will have to be substantially modified in order to accommodate the new screening mandates. Every system-restructuring proposal should be carefully evaluated in terms of privacy issues.

F. Using Records for Employment Decisions

Probably the single most complex and sensitive issue related to criminal history screening is the ultimate use of the records in making employment or licensing decisions. The new federal legislation fails to address this controversial subject. Therefore, it is unclear who will make final decisions on whether or not a given applicant's record is sufficiently "acceptable" so as to permit new or continued employment. States must decide whether to statutorily direct programs not to hire applicants and whether to fire employees based on a record of certain designated crimes. Thus, one major problem will be deciding which offenses make a person unsuitable for a position working with children. States that mandate record screening but fail to specify that certain types of convictions will prevent a person from working with children invite confusion, potential abuses, or misapplication in the use of record information by employers and licensing authorities. Whether mere arrests not resulting in conviction can be an employment bar must also be carefully considered. States must also consider what appeal rights and other legal remedies individuals will have when they are denied employment because of a "record."

The unrestricted use of criminal history data by employers may also be objectionable in light of federal and state equal employment opportunity law, particularly when such use has an adverse impact focusing on racial minority group members.[65] For example, courts have found that Blacks are arrested and convicted in proportionately far higher percentages than Whites, and they have used this finding

64. *See supra* note 54.
65. Green v. Missouri Pacific Railroad Company, 523 F.2d 1290 (8th Cir. 1975).

to strike down policies which permitted the use of employer discretion in automatically denying employment based on criminal records.[66] Therefore, states developing new screening laws will have to consider the possibility of an adverse impact on minorities in allowing employers and licensors complete discretion in actions related to arrest and conviction records. Particularly in the inner city, where child care and youth services programs are likely to attract minority group applicants, a high rate of applicant criminal histories may force policy makers to carefully ensure that record-based bars to employment are enumerated clearly and are closely related to job responsibilities.

A final problem employers and public licensing agencies face with respect to applicant and employee record screening relates to possible liability for failing to seek or properly act on record information. Once state law requires screening, those who hire a person or allow a person to remain on their staff without conducting a record check (or despite a knowledge of that person's prior record) will face potential liability if a child is injured by that person. Indeed, there are already cases brought under the common law *respondeat superior* and "negligent hiring" doctrines that have held employers liable for the criminal conduct of their employees.[67] Most courts have concluded that in the absence of a specific law, employers do not have the duty to check applicant criminal histories.[68] The existence of new statutes authorizing or mandating such checks, however, will likely encourage courts to reach a different conclusion.

G. The Federal Role

As suggested earlier, there is already a critical need for states to receive guidance from the federal government on how to implement the DeConcini Act. The U.S. Department of Health and Human Services (HHS) will be disseminating new federal funds to states, which in turn are expected to pass legislation which complies with the Act by September 30, 1985. Whether HHS will provide necessary training and technology transfer, as well as model state guidelines, regulations, and statutory material to aid in local implementation of the new federal screening legislation is not clear. Likewise, the Office of Juvenile Justice and Delinquence Prevention (OJJDP) of the U.S. Department of Justice, the federal agency closest to the

66. Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970).

67. *See, e.g.*, Williams v. Feather Sound Inc., 386 So.2d 1238 (Fla. Dist. Ct. App. 1980); Welsh Manufacturing Division of Texitron, Inc. v. Pinkerton's Inc., ___ R.I. ___, 474 A.2d 436 (1984).

68. *See, e.g.*, Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978); Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983).

juvenile detention, correction and treatment community nationwide, will have to consider what role it will play in encouraging juvenile programs to comply with the new law. These two federal agencies, along with the FBI, will have to coordinate their efforts if the DeConcini Act is to be fully implemented.

Technical assistance to the states will be most needed in the areas of the fingerprinting process and the required scope of screening. HHS and OJJDP are in a unique position to work with their counterparts at the state agency level in assuring that local programs are aware of the new federal law and what it requires; the expectations of Congress as to who must be screened (e.g., all directors, staff, and job applicants); and recommended logistical processes, including the securing and transmittal of fingerprints. The FBI should advise state child welfare, juvenile justice, and child care licensing agencies on how to secure assistance of state criminal history record agencies and local police departments. HHS and the FBI could be most helpful if they assisted states in developing appropriate legislation which will comply both with the new federal law and Public Law 92-544.[69] The FBI can also assist states by suggesting model state employment and licensing screening processes that other states have found to be particularly effective.

Monitoring implementation and compliance with the new law is the responsibility of HHS, but how this will be carried out also remains unclear. There is some indication that HHS has chosen to base compliance only on FBI approval under Public Law 92-544 of new state screening laws.[70] However, HHS must expect to receive complaints that although federal and state screening is being legislatively required in a given state, certain categories of "child care" programs are not covered by the law; or, large numbers of individual facilities are *not complying* with record check requirements. Presently, there is no indication that HHS will address the question of federal sanctions for partial state non-compliance (even though the federal law clearly requires *all* program staff and directors to be screened).

VI. Conclusion

Up to this point, the author has refrained from giving a personal

69. In the published HHS announcement relative to the DeConcini Act (*supra* note 50, at 2089) information is included on who can be contacted at the FBI for assistance and advice on the Bureau's policies on access to its criminal history records under Public Law 92-544, ". . . as well as for questions regarding: the development of state statutes and/or regulations . . . and information on nationwide criminal record checks."

70. In the HHS announcement, *supra* note 50, at 2090, it is stated that the Department of Health and Human Services ". . . will accept *any* State law regarding nationwide criminal record checks that meets the requirements of Pub. L. 92-544" (emphasis added).

opinion on the efficacy of criminal history screening. Without a doubt, such screening is overrated by some as a device to assure the protection of children in out-of-home care from molestation. Publicizing new screening provisions may indeed give parents, as well as providers and licensing agencies, a false sense of security related to the safety of children from abuse. Moreover, there exists legitimate concern in the child care field that the cost of record screening will divert new funding that is critically needed for day care and youth services into a bureaucratic record processing system.

A screening system is unlikely to discover more than a few applicants or staff with relevant records out of thousands screened.[71] Indeed, the DeConcini Act presupposes the existence of a federal record system that contains *all* conviction records, which is far from fact. Unfortunately, not all states routinely send to the FBI their complete case dispositional data.[72] Furthermore, there is reason to fear that some potentially dedicated, quality youth care employees (particularly young inner city men) will be driven away from the field due to the new emphasis on employees being free from the taint of any involvement with the police or criminal justice system. The movement for criminal record screening of child care workers also seems to disregard the fact that the overwhelming majority of day care center employees and family day care home providers are female, yet woman account for only a tiny percentage of criminal history entries in the FBI and state record systems.

Despite the above, I suggest that criminal record screening is an important, albeit imperfect, weapon in the arsenal which is available to the government and private employer to help protect children from maltreatment in out-of-home care.[73] A mandatory screening law suggests that as a public policy people whose backgrounds would render them clearly inappropriate to be placed in positions of trust

71. The HHS report on criminal record screening (*supra* note 2, at 16) notes that day care workers are 95-97% female, while 80-85% of FBI criminal history records are on males. Likewise, it observes that an estimated 78% to 92% of child sex abusers are male, yet few have criminal records for this, and where they *have* records it is usually for *other* than sexual offenses.

72. Information in the FBI criminal history record system is furnished voluntarily to the FBI by state and local law enforcement agencies, and although fingerprint cards are sent to the FBI on most felony arrestees, many jurisdictions are quite lax about following up with dispositional data. According to information reported in the HHS report (*supra* note 2, at 15), certain states send to the FBI as little as 15% of their full arrest and conviction data. Therefore, a "nationwide" criminal record check with the FBI may be deceptive in that an employee's or potential employee's full criminal record may not exist at that agency.

73. The Child Care Law Center in San Francisco has prepared an excellent paper which in addition to analyzing criminal record screening issues makes thoughtful recommendations on other means to prevent child abuse in day care settings, including the strengthening of licensing systems and better regulatory enforcement once abuse has been reported. Cohen, *Protection of Our Children or Vigilantes? Legal Considerations in Drafting Screening Laws and Recommendations for Safeguarding Children in Child Care Settings* (1985).

and authority over children will *not* be tolerated in the child care system. Coupled with an effective pre-employment screening interview and scrupulous background check of references,[74] the well-publicized routine of a criminal record check becomes a device that should dissuade many pedophiles or other disturbed people from entering into a child care or youth services position.

Criminal record screening alone can not prevent the abuse of children in child care settings. Program directors and staff need to be trained to effectively supervise employees and volunteers, so as to prevent and detect the possible occurrence of molestation by adults already working in their programs. Ways to increase the wages of those working with children must be found. Child care workers, for example, are among the lowest paid employees in the nation. Low wages only contribute to a work environment that is filled with pressures and constant responsibilities, increasing the possibility that some weak people lose emotional control and mistreat the children in their charge. Child and youth programs should also educate staff, volunteers, and especially the children in their care to the problem of abuse; what abusive behavior consists of; what to do when they become aware of abuse in the program; and how to avoid abuse. All programs should be constantly open to parents, who should be permitted and encouraged to make announced or unannounced visits at any time. In short, record screening is not a panacea, but it *is* part of a panoply of devices that a sensitive and caring public child welfare system can use to protect young children from abuse and neglect.

74. There is no universally agreed upon profile of the "typical" pedophile or other type of sex offender. Therefore, there is no simple formula to screen potential volunteer. Some volunteer-based organizations, such as the Big Brothers/Big Sisters of America, are to be commended for their attempts to grapple with the *interview screening* issue and their development of some guidance to local affiliates. *See also, Screening for Sex Offenders in Volunteer Programs*, Child Protection Connection, Vermont Child Protection Coalition, January, 1985, at 3. The HHS *Model Act* (*supra* note 38, at 22-25) contains useful materials on *reference checking.*

APPENDIX*

State Legislation Regarding Criminal and Child Abuse Record Checks for People Working With Children

ALASKA STAT. § 12.62.035 (1984).
CAL. EDUC. CODE §§ 45123, 45125 (West 1978).
CAL. HEALTH AND SAFETY CODE §§ 1502(a)(3), 1522 (West 1984).
CAL. PENAL CODE § 11105.2 (West 1982).
CAL. REV. STAT. §§ 26-6-104(7), 26-6-108(2)(a) and (3) (1984).
COLO. REV. STAT. §§ 26-6-107(7); 26-6-108(2)(a) (1984).
CONN. GEN. STAT. ANN. § 54-142k(f) (West 1984).
Act of May 30, 1984, Public Act No. 84-190, 1984 Conn. Legis. Serv. 5 (West).
FLA. STAT. ANN. §§ 231.17, 231.28, 231.47, 402.302-3055 (West 1984).
GA. CODE ANN. § 49-5-60 (1984).
ILL. ANN. STAT. Ch. 95 ½, § 6-106.1 (Smith-Hurd 1984).
ILL. ANN. STAT. Ch. 23, § 2214 (Smith-Hurd 1984).
IND. CODE ANN. § 5-2-5-5 (Burns 1984).
IOWA CODE ANN. § 692.2 (West 1984).
KY. REV. STAT. ANN. § 17.160 (1984).
MD. FAM. LAW CODE ANN. § 5-551(c) (1984).
MINN. STAT. ANN. §§ 171.321g, 245.73, 80D.03 (West 1984).
NEV. REV. STAT. ANN. § 170-E:4 (1983).
N.J. STAT. ANN. §§ 9:3-47, 9:3-48, 9:6-1; 18A:39-19, 30:4C-12 (West 1984).
N.Y. SOC. SERV. Law §§ 378-a, 424-a(1) (McKinney 1983), 1984).
S.C. CODE ANN. § 59-26-40 (Law. Co-op. 1984).
UTAH CODE ANN. § 77-27-22 (1982).
VA. CODE § 19.2-389(A)(vii) (1983).

*_Author's Note_: Most of the legislative research for this article was conducted at the end of 1984. As a result of the DeConcini Act and public/legislative awareness of record screening as a child protection device, there has been considerable recent activity in state legislatures on this issue during the time that this article was in press. Therefore, the reader is cautioned not to consider the above list as representing all relevant statutes now in effect.